No. 14,724

IN THE

United States Court of Appeals

For the Ninth Circuit

HASKELL PLUMBING AND HEATING COMPANY, INC., a corporation authorized under the laws of the State of Washington and doing business in the Territory of Alaska,

Appellant,

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE CULLINANE, OLE FRANZ, ROY CALLAWAY, TOM MULCAHY, BEN HOLBROOK and JESSE HOBBS,

Appellees.

On Appeal from the District Court for the Territory of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

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REPLY STATEMENT OF FACTS.

Appellant for reply to appellees' brief must correct what appellant contends to be an erroneous statement. On page 2 of appellees' brief it is stated that "an explosion resulted *from defendant's negligence*".

There is no evidence in the record anywhere that the defendant or any agent, servant, or employee of its, committed an act of negligence. There is some testimony that the "Bull Cook" who unquestionably was an employee of another corporation and not an employee, agent or servant of the Haskell Plumbing & Heating Company, put some gasoline in a quantity of oil. But, that particular employee was an employee of the general contractor, Gaasland Construction Company. (Tr. 466-467.)

Counsel for appellee stated in his brief at page 6 that "defendant objected on the grounds that the answers to interrogatories were not admissible in evidence but were limited to Rule 33 to discovery only", but, did not mention in their brief that defendants objected further, "that they were *incompetent, irrelevant* and *immaterial"; "that they did not meet the rules of evidence"* (Tr. 203, 204 and 205); when the record shows that each of the witnesses were put on the stand and certain questions asked them and then the interrogatories having previously been answered by them were introduced as a part of the witnesses' evidence and *defendant was not permitted to cross-examine the witness on anything in the interrogatories which was the sole evidence of the damages suffered and the value of the property lost.* As noted in our original brief, this applies to many of the plaintiffs and we contend that no evidence of any property loss or the value thereof was ever proved by any competent evidence, since the only evidence offered by these particular plaintiffs was the interrogatories and

answer filed in the discovery effort and no portion of these interrogatories were admissible in evidence and their admission was objected to and therefore no competent evidence as to damage suffered or property lost was ever introduced.

Counsel for appellees take a very broad exception to our statement to the effect that the contract introduced, did not contain in the body thereof anywhere, the name of the defendant in this action, and accused counsel of mis-stating facts. We call your attention to this exhibit commencing on page 426 Tr. and again we call your attention to the fact that this is a contract entered into "between the *Plumbing, Heating & Pipe Employers of Anchorage, Alaska* and Local No. 367 of the United Association of Journeymen and Apprentices of the plumbing and pipe fitting industries of the United States and Canada." Now, we again call to your attention that Haskell Plumbing & Heating Company, Inc., a corporation's name is not mentioned in the contract *anywhere.* But, at the base of it, there is signed to it *F. M.* Haskell Plumbing & Heating Company, Inc. Whether or not *F. M.* Haskell Plumbing & Heating Company, Inc., is the same corporation as Haskell Plumbing & Heating Corporation, no one has explained in the record and there is no evidence to that effect. There is nothing in the contract other than the signature of F. M. Haskell to bind the Haskell Plumbing & Heating Company in any way and neither *F. M.* Haskell Plumbing & Heating Company, Inc. nor Haskell Plumbing & Heating Company, Inc. are mentioned in the body of

the contract and that is exactly what we called your attention to in our statement set forth in the brief.

On page 8 of appellees' brief you will find the statement that "prime contractor, Gaasland, was required to pay defendant for its work on the heating and plumbing; it showed that defendant had an obligation to pay Gaasland for housing and feeding its employees". This, of course, is correct. Then, the statement as follows: It showed that defendant and Gaasland worked out a private arrangement by which Gaasland would turn over to defendants a barracks building in which to house defendant's employees and provide a man, "Bull Cook", to be caretaker of the premises and in addition would provide meals for the defendant's employees. There is not a scintilla of testimony that the "Bull Cook" was an employee in any way of Haskell Plumbing & Heating Company, Inc. and on the contrary, he was an employee of Gaasland and the defendant paid Gaasland for feeding and housing its employees and Gaasland became an independent contractor for the purpose of feeding and housing all subcontractor's employees (Tr. 397-398)—"Gaasland furnished all the personnel to take care of it—eating, housing." (Tr. 398.)

We specifically call your attention to the true facts as set out in this contract (Tr. 6 (a) page 438) "member sent out of town by the employers *shall be furnished* first class board, room and transportation and straight-time wages, etc." The very contract implies that the employer shall pay for the board, room and transportation. It does not even indicate that the

board, room and transportation is to be personally performed by the appellant corporation and, the evidence shows conclusively in this case that if there was any negligence, then the negligence was that of the "Bull Cook" of the Gaasland Construction Company and not an employee, agent or servant of the Haskell Plumbing & Heating Company, Inc. The balance of the statement of facts of appellees is purely argumentive.

We have never felt that any of our cases were so weak that we needed to resort to abuse of opposing counsel. Even if we have often found where counsel was mistaken some in over-stating their position in the arguments in their brief. But, since appellants have spent a good portion of their time in the brief insinuating dishonesty on the part of appellant's counsel, it will be necessary for us to call your attention to some of the things that need explaining to you. In the first place, our brief was written from the transcript printed in this case September 21, 1955. Our brief printed and filed in compliance with our letter to Pernau-Walsh Printing Company dated November 23, 1955 and after our brief was served on the appellees there was a supplemental transcript printed December 23, 1955, which contains most of the testimony complained of by appellees. (See page 10 of their brief.) It will show that the last page of the original transcript is 449 and the supplemental transcript starts with page 451 and continues to 472 and the portion appellants quote in their brief of the testimony of F. Murray Haskell was not in the

original transcript, but was in the supplemental transcript prepared by appellees after our brief was prepared, served and filed. All of this information is and has been in the hands of the appellees and must have been known by them when their brief was being prepared.

The contract that we so earnestly objected to its admission is found in the original transcript page 426 and we certainly did object to its introduction because the contract itself shows that it is between the Plumbing, Heating & Pipe *Employers of Anchorage,* Alaska, and Local 367 of the United Association of Journeymen and Apprentices of the plumbing and pipe fitting industry of the United States and Canada. Haskell Plumbing & Heating Company is not an Alaskan Company at all, but is a Washington corporation with its principal place of business in that state. (See plaintiff's complaint.) We have heretofore called your attention to the fact that this contract was signed F. M. Haskell Plumbing & Heating Company, Inc., a legal assumption could very easily arise that *F. M. Haskell Plumbing & Heating Company,* could be a separate corporation from *Haskell Plumbing & Heating Company* and the address on the bottom of the contract on page 443 that was written there by F. M. Haskell is 1509 Cornwall Avenue, Bellingham, Washington.

However, whether or not the written contract was entered into between the appellant and the appellees, its name is not mentioned in the body of the contract and is very immaterial and should in no way affect

this law suit. Our statement was merely to outline the issues as we saw them.

The questions raised in this appeal have little to do with the terms of that contract, but I wish to call your attention to the fact that on page 438 Tr. the sixth paragraph of this contract states: Members sent out of town by the employers *shall be furnished* first class board, room and transportation." It shows clearly that this is to be furnished to them and the very fact that Haskell Plumbing & Heating Company paid for the board and lodging of its employees to Gaasland Construction Company, whom the record shows furnished all subcontractors' employees with board and room for a set price per man day does not come within the nondelegable duty, that counsel for appellees contend for.

Haskell Plumbing & Heating Company are plumbing contractors and everyone knows, are not engaged in the business of boarding and rooming people. But, the word "furnished" as used in this contract as defined by Black's Law Dictionary is: *To supply; provide, provide for use, whether gratuitously or otherwise,* and simply meant to arrange for it and to pay the bill and that is all that was done in this case and does not come within the nondelegable duty of personnel services of a highly technical character.

The independent contractor insofar as the food and lodging is concerned was Gaasland Construction Company, whom the evidence shows furnished Quonset huts, for the various contractors, had a large eating establishment, where all employees of the various sub-

contractors ate their meals, and the testimony shows clearly that Gaasland Construction Company furnished the Quonset huts, the food *and all of the personnel to operate this service* and the undisputed evidence found in the supplemental transcript on pages 457, 458 and 459, a part of which is as follows:

"Q. Who requested this Quonset hut or barracks which the plaintiffs occupied there at King Salmon after leaving the Sky Motel; who directed or requested the construction or preparation of those facilities for these men who worked for you?

A. *Gaasland Construction Company.*

Q. Did Haskell Plumbing & Heating Company make any request or have any agreement with the Gaasland Construction Company for the construction or preparation of those facilities for your men?

A. *We were asked to submit the number of men that we would* have, to Gaasland so they could prepare to house the total number, that would be required for all the different subcontractors on the job.

Q. Then is it your testimony that the Gaasland Construction Company was the owner of this Quonset hut or barracks which burned on October 11th, 1951?

A. That is correct.

Q. And the Haskell Plumbing & Heating Company had an agreement with the Gaasland Construction Company——

Mr. Gemmill. Wait until I finish.

Q. (Continuing). ——whereby the Gaasland Construction (15) Company furnished these facilities for your men?

A. Yes; at a going rate.

Q. And did you have a written agreement or contract with Gaasland Construction Company?

A. In regard to housing and that?

Q. In regard to housing your employees up there?

A. No, Sir, no more than I would have with Universal Foods in Fairbanks or Anchorage where the same type of housing is available."

The learned trial judge in our opinion became confused on the law in this case and there is a *difference* in the applicable law where the contractor was actually preparing and serving the food and served something that caused sickness of the employee, and the case at bar. The word furnishing as used in the contract was complied with by paying for the food and lodging *acceptable to the employees,* which was furnished by the general contractor, Gaasland Construction Company. We contend that the fire, which destroyed the plaintiff's property, must have its origin by the negligence of the defendant below, before a cause of action exists against it. In other words, the plaintiff's case here must as a matter of law, be based upon negligence of the employer, and not the negligence of someone else as is the case here. Assuming that one of the plaintiffs did observe the mixing of gasoline with the stove oil by the "Bull Cook", he must have known that the "Bull Cook" being an employee of Gaasland Construction Company, the principal contractor on the job, and the subcontractor furnishing the food and lodging for all of the subcon-

tractors' men, that the negligence, if any, was the negligence of employees of Gaasland Construction Company, and not the negligence of the defendant. This was argued to the trial court at all points of the case. But, the trial court took the position that there was a non-delegable duty of the defendant *to protect the property of the employees* and upon this theory he rendered judgment in favor of the Plaintiffs.

Now, there positively is no non-delegable duty in this case and the plaintiff has furnished us no authority for so holding. He has cited a portion of a paragraph of the 35th Am. Jur. and to read the entire paragraph 105, of 35 Am. Jur. on page 533, we find a different rule from that contended for by appellees, except the last paragraph and that paragraph is based upon *Griffith v. Cole Brothers,* 165 Northwestern 577, and an analysis of the case does not justify the statement quoted from it in Am. Jur. This statement in Am. Jur. must have been taken from the District Court decision, which was later reversed on appeal.

This was a Workman's Compensation case based upon a death having taken place in a tent furnished by the employer, the husband of the claimant having been killed by lightning, and went off on the theory as set out in Syl. 8 as follows:

> "8. Master and Servant 403—Workmen's Compensation Act—'Arising out of Employment.'
>
> A bridge builder having finished work for the day, when struck by lightning while sitting in the boarding tent furnished by the employer, did not receive an injury arising out of his employment."

But, this is not in point with the case at bar, because the case at bar is not a workman's compensation case, but is an action based solely upon negligence. We do contend that the case is very material however, because the quotation cited by appellees as 35 Am. Jur. 533 is based on this case evidently before it was reversed by the Supreme Court of Iowa.

Counsel for appellees contend on page 14 of their brief that the defendant's answer did not plead contributory negligence or assumption of risk; this is true, but the case was tried on that theory without objections and the answer will be considered as amended under Rule 15 subparagraph (b).

We call to your attention that if the interrogatories were properly admitted, which we strenuously contend that they were not, then there is no competent evidence even in the interrogatories and answers upon which a judgment for any amount could be based, as there is not even an attempt to fix the damage suffered by the individual plaintiffs and nothing upon which the court could base a judgment. There is not even evidence of value of the articles lost, if any.

SPECIFIC REFERENCE AND REPLY TO FIRST ARGUMENT IN APPELLEES' BRIEF AT PAGE 14.

We must call your attention to the fact that no new citations were furnished by appellees' brief. However, we appreciate the opinion of the attorney stated therein but we do not feel that it is as persuasive as the many citations of authorities that are before this

Honorable Court. But, we confess that we overlooked a very important case in writing the appellant's brief. It is *Arnstein v. Porter,* 154 Fed. 2d 464, and, in the body of the opinion on page 470 there is a very intellectual resume of conditions that should assist this Honorable Court in analyzing the question herein involved, and specifically answers the argument of appellees' attorney in his brief. This statement taken from page 470 is as follows:

> "To be sure, plaintiff examined defendant on deposition. But the right to use depositions for discovery, or for limited purposes at a trial, of course *does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury.* For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives. As we have said, 'a deposition has always been, and still is, treated as a substitute, a second-best, *not to be used when the original is at hand'* for it deprives 'of the advantage of having the witness before the jury.' It has been said that as 'the appearance and manner of the witness' is often 'a complete antidote' to what he testifies, 'we cannot very well overestimate the importance of having the witness examined and cross-examined in presence of the court and jury.' Judge Lumpkin remarked that 'the oral testimony of the witness, in the presence of the Court and Jury, is much better evidence than his deposition can be * * * Coxe, J., noted that 'a witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impres-

sion.' As a deposition 'cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,' it 'is * * * or it may be, the dead body of the evidence, without its spirit * * *' 'It is sometimes difficult and impossible to get so full, explicit, and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury.' 'The right of a party, therefore, to have a witness subjected to the personal view of the jury, is a valuable right, of which he should not be deprived * * * except by necessity. And that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial.' '' (Emphasis ours.)

REPLY TO SECOND ARGUMENT OF APPELLEES.

We still have the benefit of no citation by appellees, but simply the argument of counsel for the appellees. Our reply is that we rely upon the citations in the original brief and call to your attention that there is positively no testimony of negligence of the defendant in the court below, appellant here, and the judgment should be reversed, with instructions to the lower court to sustain appellant's (defendant below) motion to deny plaintiffs any recovery at all and to dismiss plaintiffs' complaint.

Counsel for appellees in their brief at page 28, under the title of Further Argument on Point 4 have cited an authority, Williston on Contracts, Revised Ed., Volume 2, Section 411. The reading of this sec-

tion shows its inapplicability to the question involved in this appeal and the next citation 35 Am. Jur. 533 has been previously handled in this reply brief and 35 Am. Jur. 570, of course, does not touch the question here and affects an altogether different situation. It affects the repair of the instruments used by his employees doing their job.

Appellees also refer to 35 Am. Jur. 612. In studying the wording we cannot find in this quotation the words *"to maintain a safe place for his employees"* as the actual reading of this citation is:

> "This duty of the employer is affirmative and continuing and it cannot be delegated to another so as to relieve the employer of liability in case of non-performance."

and does not contain the words "to maintain a safe place for his employees" and, by adding those words you will note, the entire utterance or quotation is changed.

This of course could be an innocent mistake of counsel, and it must have been, but by including in this quotation the words that are not there, and if read as stated in the brief, the statement of law is completely changed. Commencing in the 6th line of paragraph 183 on page 610 of 35 Am. Jur. and reading down to the bottom of the paragraph on page 612 we find the following:

> "Unless, however, the failure to furnish a reasonably safe place to work is the proximate cause of the employee's injuries, the latter cannot recover on that ground. In this respect, as in others,

> the employer is not liable as an insurer; the measure of his obligation is the exercise of ordinary or reasonable care, the standard being the care exercised by prudent employers in similar circumstances, and the degree depending upon the dangers attending the employment.
>
> This duty of the employer is affirmative and continuing, and it cannot be delegated to another so as to relieve the employer of liability in case of non-performance.
>
> The question whether in any particular case the employer has discharged his duty in this respect is ordinarily one for the jury's determination."

It should be noted that the words "to maintain a safe place for his employees" as quoted in the last paragraph on page 33 of appellees' brief, are erroneously quoted, and are not there.

On page 34 of appellees' brief a quotation from 35 Am. Jur. page 579 is found. This quotation does not apply to the case at bar, in our opinion, because the employees were not sleeping on the grounds where they were working, but more than a quarter of a mile therefrom as shown in the evidence and in a Quonset hut furnished by the general contractor, Gaasland Construction Company.

We find another quotation on page 35 from 27 Am. Jur. 526. This quotation is based upon *Atlanta & F. R. Co. v. Kimberly,* 13 Southeast 277, from the Supreme Court of Georgia and to analyze the case you find it does not support the quotation. We quote from page 277 of the opinion as follows:

> "The main question argued before us was whether under the facts of this case the railroad company was liable for the damages sustained by Kimberly. The general rule of law upon this subject is: Where an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor's servants."

This case supports our contention instead of the contention of appellees.

The next argument, page 36, has been covered previously. Then, on page 38 the citation quoted from 35 Am. Jur. 743 is certainly not in point at all as it affects a situation altogether different from the one before the Court. But, if you read on down after omitting approximately three lines, you find these words:

> "* * * if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence."

CONCLUSION.

We wish to state in conclusion that none of the plaintiffs have made a case against the defendant

Haskell Plumbing & Heating Company and appellees' brief has failed to show any reason to the contrary, there being no evidence of any negligence on the part of the defendant in the court below, appellant here; for the further reason that there was no evidence of damages suffered or loss sustained by any of the defendants except Roy Callaway and Jesse Hobbs. The trial Court erred in permitting the introduction of the interrogatories with the answers by the respective plaintiffs, even though the plaintiffs were present and took the stand and testified to a part of their case and the defendant was prohibited from cross-examining the plaintiffs on the answers included in the interrogatories. The admission of these interrogatories in evidence was, in our humble opinion, a very prejudicial error which prevented the defendant from having a fair trial; this lack of evidence as to proof of loss of property or damage suffered, should have been taken into consideration, in connection with the defendant's separate motions to dismiss, as to each of the plaintiffs, for lack of evidence. These motions should have been sustained and an order of dismissal entered.

Dated, Anchorage, Alaska,
March 2, 1956.

Respectfully submitted,
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